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INDIRA GANDHI MUTHO v. KETUA POLIS NEGARA

FEDERAL COURT, PUTRAJAYA
MD RAUS SHARIF PCA
ABDULL HAMID EMBONG FCJ
AZAHAR MOHAMED FCJ
B ZAHARAH IBRAHIM FCJ
AZIAH ALI JCA
[CIVIL APPEAL NO: 01(f)-32-05-2015(A)]
29 APRIL 2016

C ***FAMILY LAW:*** *Children – Custody – Recovery order – Conversion of one parent to Islam – Child taken away by converting parent from custody of other parent – Conflicting custody orders granted by civil and Syariah courts – Whether orders complied with – Whether civil court could grant recovery order in face of custody order by Syariah court – Whether civil court could order Inspector General of Police*
D *to execute recovery order against converting parent – Requirements under ss. 52 and 53 of Child Act 2001 – Whether fulfilled*

ADMINISTRATIVE LAW: *Remedies – Mandamus – Order of mandamus to compel Inspector General of Police (IGP) to execute warrant of committal – Whether related to enforcement of court process involving private rights – Whether within*
E *scope of public duties – Court's order wilfully disobeyed by party against whom warrant of committal was issued – Whether warrant of committal needs to be executed*

The appellant and one Pathmanathan Krishnan ('Pathmanathan') were
F married under the Law Reform (Marriage and Divorce) Act 1976 ('LRA') and had three children. On 11 March 2009, Pathamanathan converted to Islam and thereafter converted the three children to Islam. After the conversion, Pathmanathan obtained a custody order of the three children from the Syariah High Court. In the meantime, the appellant filed an application in the civil High Court for custody of the three children under
G the provisions of the LRA. On 11 March 2010, the civil High Court granted the appellant custody of the three children. However, the youngest child ('PD') was taken away by Pathmanathan from the appellant without her consent and he refused to surrender PD to her. On 30 May 2011, the appellant applied and successfully obtained a committal order, ordering that
H Pathmanathan be committed to prison until the contempt was purged by delivery of PD to the appellant. The appellant also obtained a recovery order under s. 53 of the Child Act 2001 ('Child Act') directing the bailiff and the police to search for PD and to retrieve her and return her to the appellant. The Inspector General of Police ('IGP') refused to mandate the execution of
I the warrant of committal and the recovery order on the ground that the police were faced with two conflicting orders, namely, the Syariah High Court order granting custody to Pathmanathan and the civil High Court order

granting custody to the appellant. The IGP took the position that to execute the custody order of the civil High Court would cause him to be in contempt of the Syariah High Court order. Consequently, the appellant applied to the civil High Court for judicial review under O. 53 of the Rules of Court 2012 ('ROC') for the following reliefs (i) an order of *mandamus* to compel the IGP to execute and enforce the Committal Order and the Recovery Order; and (ii) an order of prohibition to restrain the IGP from executing and enforcing the Syariah High Court order that concerned the appellant and her three children from the marriage with Pathmanathan. The High Court allowed the appellant's application and an order of *mandamus* was issued against the IGP to compel the execution of the warrant of committal and the recovery order. The Court of Appeal, however, decided in favour of the IGP and was of the view that an order of *mandamus* could only be issued when there was a public duty imposed in law on a person or body and the purpose of the order was to compel that person or body to carry out the duty required by law to be performed by him or by it. The Court of Appeal held that the order of *mandamus* against the IGP related to the enforcement of the court processes which involved private rights of the appellant, thus did not come within the scope of public duties of the IGP or the police. Hence, the appellant appealed against the said decision. The question that arose before this court was whether the IGP could refuse to command the execution of the two said orders.

Held (allowing appeal)
Per Md Raus Sharif PCA delivering the judgment of the court:

(1) A recovery order can only be issued in circumstances provided for in s. 52 of the Child Act and can only be obtained if the elements in s. 53 of the same Act are fulfilled which are (i) the court has reason to believe that a child has been taken or sent away; or (ii) the act is done without the consent of the person who has lawful custody of the child. In the present case, there are two conflicting custodial orders. One was the Syariah High Court order giving custody of the children to Pathmanathan. The other was the civil High Court order which gave custody of the children to the appellant. As such, the recovery order should not have been given by the civil High Court because pertinent elements under s. 52 of the Child Act had not been fulfilled. No order of *mandamus* can be issued when such right is doubtful and not free from any reasonable controversy. (paras 25-27)

(2) This case did not relate purely to the private right of the appellant and Pathmanathan over the custody of the three children. The private dispute between the two parties had somewhat developed into a challenge to the administration of justice. Pathamanathan, despite having exhausted all avenues to challenge the custody order granted by the civil High Court, was now wilfully disobeying the court's order. The

chronology of events herein showed that Pathmanathan had no respect for the court's order. This kind of conduct could not be condoned. The administration of justice would be brought into disrepute if the court's order was wilfully disobeyed by a party against whom a warrant of committal had been issued after he was found guilty of contempt of court. Pathamanthan therefore must be apprehended to face justice. In order to do so, the warrant of committal needs to be executed and the proper authority to do so had to be the police. (paras 31-33)

(3) The IGP could not refuse to command his officers to execute the warrant of committal issued by the civil High Court. Thus, when the IGP declared his intention not to execute the said Warrant of Committal, an order of *mandamus* could be issued against him. Therefore, an order in the nature of *mandamus*, under para.1 of the Schedule to the Courts of Judicature Act 1964, can be directed to the IGP to compel him to command the execution of the warrant of committal (Form 108 of the Rules of Court 2012) when the IGP had demonstrated a refusal to execute or command the execution of the said warrant of committal. (paras 34 & 35)

***Bahasa Malaysia** Headnotes*

Perayu dan satu Pathmanathan Krishnan ('Pathmanathan') berkahwin di bawah Akta Pembaharuan Undang-Undang (Perkahwinan dan Perceraian) 1976 ('LRA') dan dikurniakan dengan tiga orang anak. Pada 11 Mac 2009, Pathmanathan menukar agamanya kepada agama Islam dan seterusnya menukarkan agama anak-anaknya pada agama Islam. Selepas penukaran agama itu, Pathmanathan memperolehi perintah jagaan ke atas ketiga-tiga anaknya dari Mahkamah Syariah. Pada masa yang sama, perayu memfailkan permohonan di Mahkamah Tinggi sivil untuk perintah jagaan ketiga-tiga anaknya di bawah peruntukan LRA. Pada 11 Mac 2010, Mahkamah Tinggi sivil memberikan perintah jagaan ketiga-tiga anak itu kepada perayu. Walau bagaimanapun, anak bongsu mereka ('PD') dibawa lari oleh Pathmanathan tanpa kebenaran perayu dan Pathmanathan enggan menyerah PD kepada perayu. Pada 30 Mei 2011, perayu memohon dan berjaya memperolehi perintah komital, dengan memerintahkan Pathmanathan dipenjarakan sehingga pelanggaran diselesaikan melalui penyerahan PD kepada perayu. Perayu juga memperolehi perintah mendapatkan semula di bawah s. 53 Akta Kanak-Kanak 2001 ('Akta Kanak-Kanak') mengarahkan bailif dan pihak polis untuk mencari PD dan mendapatkan kembali PD serta menyerahkannya kepada perayu. Ketua Polis Negara ('KPN') enggan mewajibkan pelaksanaan waran komital dan perintah mendapatkan semula atas alasan bahawa pihak polis berdepan dengan dua perintah bercanggah, iaitu Mahkamah Tinggi Syariah memberikan perintah jagaan kepada Pathmanathan dan Mahkamah Tinggi sivil memberikan perintah jagaan kepada perayu. KPN mengambil kedudukan bahawa untuk melaksanakan

perintah jagaan Mahkamah Tinggi sivil akan menyebabkan beliau melanggar perintah Mahkamah Syariah. Akibatnya, perayu memohon ke Mahkamah Tinggi sivil untuk semakan kehakiman di bawah A. 53 Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk relif-relif berikut (i) satu perintah *mandamus* untuk mewajibkan KPN melaksanakan dan menguatkuasakan perintah komital dan perintah mendapatkan semula; dan (ii) satu perintah larangan menghalang KPN daripada melaksanakan dan menguatkuasakan perintah Mahkamah Syariah berkenaan perayu dan ketiga-tiga anaknya dari perkahwinannya dengan Pathmanathan. Mahkamah Tinggi membenarkan permohonan perayu dan satu perintah *mandamus* telah dikeluarkan terhadap KPN untuk mewajibkan pelaksanaan waran komital dan perintah mendapatkan semula. Mahkamah Rayuan, walau bagaimanapun, memutuskan memihak kepada KPN dan berpandangan bahawa perintah *mandamus* hanya boleh dikeluarkan apabila terdapat kewajipan umum yang dikenakan oleh undang-undang ke atas seseorang atau perbadanan dan tujuan perintah itu adalah untuk mewajibkan seseorang atau perbadanan itu melaksanakan kewajipannya seperti yang diperlukan oleh undang-undang. Mahkamah Rayuan memutuskan bahawa perintah *mandamus* terhadap KPN berhubungan dengan pelaksanaan proses mahkamah yang melibatkan hak-hak peribadi perayu tidak terangkum dalam skop tanggungjawab awam KPN atau pihak polis. Oleh itu, perayu merayu terhadap keputusan tersebut. Persoalan yang berbangkit di hadapan mahkamah ini adalah sama ada KPN boleh menolak untuk melaksanakan dua perintah tersebut.

Diputuskan (membenarkan rayuan)
Oleh Md Raus Sharif PMR menyampaikan penghakiman mahkamah:

(1) Perintah mendapatkan semula hanya boleh dikeluarkan dalam keadaan yang diperuntukkan dalam s. 52 Akta Kanak-Kanak dan hanya boleh diperolehi jika elemen-elemen dalam s. 53 Akta yang sama dipenuhi iaitu (i) mahkamah mempunyai alasan untuk mempercayai bahawa kanak-kanak itu dibawa lari atau dihantar ke tempat lain; dan (ii) tindakan itu dibuat tanpa kebenaran pihak yang mempunyai hak penjagaan dari segi undang-undang ke atas kanak-kanak itu. Dalam kes ini, terdapat dua perintah jagaan yang bercanggah. Satu dari Mahkamah Syariah yang memberikan hak jagaan kanak-kanak itu kepada Pathmanathan. Yang lagi satu dari Mahkamah Tinggi sivil yang memberikan hak jagaan kanak-kanak itu kepada perayu. Oleh itu, perintah mendapatkan semula tidak sepatutnya diberikan oleh Mahkamah Tinggi sivil kerana elemen penting di bawah s. 52 Akta Kanak-Kanak tidak dipenuhi. Tiada perintah *mandamus* boleh dikeluarkan apabila hak diragui dan tidak bebas daripada kontroversi munasabah.

(2) Kes ini tidak hanya berhubungan dengan hak peribadi perayu dan Pathmanathan ke atas hak jagaan ketiga-tiga anak mereka. Pertikaian peribadi di antara kedua-dua pihak sedikit sebanyak berkembang menjadi satu cabaran untuk pentadbiran keadilan. Pathmanathan, walaupun telah menggunakan semua cara untuk membantah perintah jagaan yang telah diberikan oleh Mahkamah Tinggi sivil, kini dengan sengaja mengingkari perintah mahkamah. Kronologi peristiwa menunjukkan bahawa Pathmanathan tidak menghormati perintah mahkamah. Kelakuan seperti ini tidak sepatutnya dibiarkan. Pentadbiran keadilan akan dibawa ke dalam keaiban jika perintah mahkamah sengaja diingkari oleh pihak yang dikenakan waran komital selepas dia didapati bersalah kerana penghinaan mahkamah. Pathmanathan perlu ditangkap untuk menghadapi keadilan. Untuk berbuat demikian, waran komital harus dilaksanakan dan pihak yang bertanggungjawab melaksanakannya adalah pihak polis.

(3) KPN tidak boleh menolak untuk memerintahkan pegawainya melaksanakan waran komital yang dikeluarkan oleh Mahkamah Tinggi sivil. Oleh itu, apabila KPN menyatakan hasratnya untuk tidak melaksanakan waran komital tersebut, satu perintah *mandamus* boleh dikeluarkan terhadapnya. Dengan itu, satu perintah bersifat *mandamus* di bawah perenggan 1 Jadual Akta Mahkamah Kehakiman 1964 boleh ditujukan kepada KPN untuk mewajibkannya memerintahkan pelaksanaan waran komital (Borang 108 Kaedah-Kaedah Mahkamah 2012) apabila KPN menunjukkan keengganan melaksanakan atau memerintahkan pelaksanaan waran komital tersebut.

Case(s) referred to:

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(refd)***

Koon Hoi Chow v. Pretam Singh [1972] 1 LNS 56 HC ***(refd)***

Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd [2008] 5 CLJ 321 FC ***(refd)***

Viran Nagapan v. Deepa Subramaniam & Other Appeals [2016] 3 CLJ 505 FC ***(refd)***

Legislation referred to:

Child Act 2001, ss. 52(2), 53
Courts of Judicature Act 1964, ss. 25(2), 78(1), Schedule para. 1
Federal Constitution, art. 121
Government Proceedings Act 1956, s. 33(1)
Police Act 1967, s. 20(3)
Rules of Court 2012, O. 53

For the appellant - Aston Paiva (M Kula Segaran with him); M/s Kula & Assocs
For the respondent - Suzana Atan (Natra Idris with her); SFCs
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(ii) Association of Women Lawyers (AWL)
(iii) Perak Women for Women (PWW)
(iv) Women's Centre for Change Penang (WCC Penang)
(v) Persatuan Kesedaran Komuniti Selangor (EMPOWER)
(vi) Persatuan Sahabat Wanita Selangor
(vii) Sabah Women's Action - Resource Group (SAWO)
(viii) Tenaganita
(ix) Sisters in Islam (SIS)
(x) All Women's Action Society (AWAM)

[Editor's note: For the Court of Appeal judgment, please see Ketua Polis Negara v. Indira Gandhi Mutho [2015] 1 CLJ 443 (overruled).]
For the High Court judgment, please see Indira Gandhi Mutho v. Ketua Polis Negara [2014] 1 LNS 1352 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Md Raus Sharif PCA:

Introduction

[1] This is an appeal by the appellant against the majority decision of the Court of Appeal dated 17 December 2014 which allowed the respondent's appeal against the decision of the High Court at Ipoh. The High Court had on 12 September 2014 allowed the appellant's application for judicial review by way of *mandamus* to compel the Inspector General of Police (IGP) to execute two High Court orders, namely:

(i) a committal order dated 30 May 2014; and

(ii) a recovery order also dated 30 May 2014, given pursuant to s. 53 of the Child Act 2001.

[2] Leave to appeal was granted by this court on 22 April 2015 on the following question of law:

> Whether an order of the nature of *mandamus*, under paragraph 1 of the Schedule to the Courts of Judicature Act 1964, can be directed to the Inspector General of Police to compel the same to comply, and to control and direct the relevant and appropriate police officers to comply with:
>
> (a) A Warrant for Committal (Form 108 of the Rules of Court 2012) where what appears on the face of that warrant is not subject to any question and the warrant has not been cancelled; and
>
> (b) A Recovery Order under the Child Act 2001, where the said order has not been varied, reversed or set aside;
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> when the Inspector General of Police has demonstrated a refusal to execute or command the execution of the said Warrant for Committal and the Recovery Order.

A **Background Facts**

[3] The appellant and one Pathmanathan a/l Krishnan (Pathmanathan) were married under the Law Reform (Marriage and Divorce) Act 1976 (LRA). Out of the said marriage, they were blessed with three children, namely TD, KD and PD.

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[4] On 11 March 2009, Pathmanathan converted to Islam. Thereafter, he also converted the children to Islam. At that material time TD was 12 years old, KD was 11 years old while PD was 11 months old.

[5] After the conversion, Pathmanathan obtained a custody order of the C three children from the Syariah High Court at Ipoh. In the meantime, the appellant filed an application in the civil High Court, Ipoh for custody of the three children under the provisions of the LRA.

[6] On 11 March 2010, the civil High Court granted the appellant custody of the three children. At the time the custody order was made, the two eldest D children were with the appellant. However, the youngest child (PD) was with Pathmanathan. PD was taken away by Pathmanathan from the appellant without her consent on 31 March 2009.

[7] Despite the civil High Court order granting custody of the children to the appellant, Pathmanathan refused to surrender PD to the appellant. E

[8] On 30 May 2014, the appellant applied and successfully obtained a committal order, ordering that Pathmanathan be committed to prison until the contempt is purged by delivery of PD to the appellant. A warrant of committal was issued against Pathmanathan. The appellant also, at the same F time, obtained a recovery order under s. 53 of the Child Act 2001 (Child Act) directing the bailiff and the police to search for PD and to retrieve her from whoever is keeping her and to return her to the appellant.

[9] The IGP refused to mandate the execution of the warrant of committal and the recovery order on the ground that the police had been put in a G quandary as they were faced with two conflicting orders, namely, the Syariah High Court order granting custody to Pathmanathan and the civil High Court order granting custody to the appellant. The IGP took the position that to execute the custody order of the civil High Court would cause him to be in contempt of the Syariah High Court order.

H **[10]** Consequently, the appellant applied to the civil High Court at Ipoh for judicial review under O. 53 of the Rules of Court 2012 for the following reliefs:

(i) an order of *mandamus* to compel the IGP to execute and enforce two civil High Court orders, namely the committal order and the recovery I order both given on 30 May 2014; and

(ii) an order of prohibition to restrain the IGP from executing and enforcing the Syariah High Court order that concerns the appellant and her three children from the marriage with Pathmanathan.

At The High Court

[11] As indicated earlier, on 12 September 2014, the High Court allowed the appellant's application. An order of *mandamus* was issued against the IGP to compel the execution of the warrant of committal and the recovery order. The learned High Court Judge was of the view that the IGP could not refuse to command the execution of the two orders. According to the learned High Court Judge, the refusal by the IGP to execute the warrant of committal which expressly called on the police to apprehend Pathmanathan, the contemnor, and to escort him to prison, and there to be detained and kept in safe custody, would be to challenge the authority of an order issued by a superior court as provided for under art. 121 of the Federal Constitution. Thus, the learned High Court Judge was of the view that the declared intention of the IGP that he would not execute the two orders was tainted with an error of law and unreasonable in the circumstances of the case. According to him, the IGP's decision could not sustained and a *mandamus* order, to compel the IGP to execute the two orders, must be issued against the IGP.

At The Court Of Appeal

[12] The Court of Appeal found that the sole issue for determination was whether the order of *mandamus* to compel the IGP to execute the two orders was correctly issued and whether the High Court Judge had judiciously and properly exercised his discretion in making the order of *mandamus* against the IGP.

[13] By majority, the Court of Appeal decided in favour of the IGP. In allowing the appeal, the majority was of the view that an order of *mandamus* could only be issued when there was a public duty imposed in law on a person or body and the purpose of the order was to compel that person or body to carry out the duty required by law to be performed by him or by it. In the present case, the majority was of the view the order of *mandamus* against the IGP related to the enforcement of the court processes involving private rights of the appellant. Thus, it was held that it did not come within the scope of public duties of the IGP or the police. Hence, according to the majority, no *mandamus* could be issued against the IGP to compel him to execute the two orders issued by the learned High Court Judge.

[14] The reasoning of the majority judgment stands in sharp contrast to the reasoning of the minority judgment, which basically upheld the reasoning of the learned High Court Judge. The minority was of the view that whilst the appellant's case started as a private dispute in a civil matter, the events that

followed, causes the case to develop into an issue which related to the administration of justice. Thus, the minority was of the view that the learned High Court Judge had not erred in his application of the law and facts in allowing the appellant's application for an order of *mandamus* against the IGP.

At The Federal Court

[15] The question before us is whether the IGP can refuse to command the execution of the two orders. Before going any further we wish to state that the issue of whether the civil High Court has the power to issue a *mandamus* order of this nature is not in dispute. This is rightly so, as such power is provided for by the Courts of Judicature Act 1964 (CJA). First, s. 25(2) which provides:

> (2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:
>
> Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same issue.

[16] Then, para. 1 of the Schedule provides:

> Power to issue to any person or authority direction, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

[17] The working of s. 25(2) of the CJA had been clearly clarified by this court in *Minister of Finance, Government of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321; [2008] 4 MLJ 641. In that case, Petrojasa Sdn Bhd (the respondent) had obtained a monetary judgment at the High Court against the State Government of Sabah. The respondent then applied for and obtained a certificate of judgment sum and order for costs pursuant to s. 33(1) of the Government Proceedings Act 1956 (GPA). The party named in the certificate is the Government of Sabah. As the State Government of Sabah did not make payment as required by the certificate, the respondent filed an *ex parte* application for leave for judicial review for an order of *mandamus* against the Minister of Finance, Government of Sabah (the appellant) to pay the sum in accordance with the said certificate. Leave was granted. However, the substantive application for judicial review was dismissed by the High Court.

[18] On appeal to the Court of Appeal, the court allowed the appeal by the respondent. The appellant, then obtained leave to appeal to the Federal Court on one issue:

> Given that section 33(3) of the Government Proceeding Act 1956 imposes a statutory obligation on the Government of Sabah to pay according to a certificate issued under section 33(1), the Government Proceedings Act

1956, the issue is whether judicial review proceedings may be taken against the Minister of Finance, Government of Sabah to compel the payment according to a certificate issued under section 33(1), Government Proceedings Act 1956 for a judgment for a monetary sum obtained against the State Government of Sabah.

[19] Arifin Zakaria FCJ (as he then was) in answering the question above *inter alia* held, after referring to several passages in the judgment of the Court of Appeal in *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665; [1996] 1 MLJ 481 at p. 353 (CLJ); p. 670 (MLJ) that:

[92] From the above, the position of the law is that, there is a duty on the part of the government to pay the amount stated in the certificate issued under s 33(3) of the GPA to the Respondent. It is not a matter of discretion for the government whether to pay or not to pay. As a statutory duty it is of course binding on the state government. And it is incumbent upon the court to give effect to such statutory duty and if necessary through the coercive force of the order of *mandamus*.

[20] Thus, in that case "to put right what was plainly wrong in law" an order of *mandamus* was issued by the court to command the appellant to pay the judgment sum as stated in the certificate.

[21] In the present case, the question now is whether a *mandamus* order can be issued against the IGP commanding him to execute the two orders of the High Court. Learned counsel for the appellant had urged upon us to affirm the views taken by the learned High Court Judge and that of the minority in the Court of Appeal. Learned Senior Federal Counsel on behalf of IGP contended otherwise. She supported the view taken by the majority in the Court of Appeal that no *mandamus* order can be issued against the IGP as the matter relates to the enforcement of the court processes involving the private rights of the appellant.

[22] As stated earlier, the *mandamus* order against the IGP was to execute the two orders, namely the warrant of committal and the recovery order. We will first deal with the recovery order.

[23] In dealing with the recovery order we wish to refer to the recent decision of this court in *Viran Nagapan v. Deepa Subramaniam & Other Appeals* [2016] 3 CLJ 505; [2016] 1 MLJ 585. In that case, the IGP was also confronted with two custodial orders. One was the Syariah High Court's order dated 19 September 2013, which granted custody of the children to the ex-husband. The other was the civil High Court's order dated 7 April 2014, which gave custody of the children to the ex-wife. However, two days after the custody order was granted in favour of the ex-wife, one of the children, namely Mithran a/l Viran was taken away by the ex-husband. The ex-wife then applied for recovery order before the civil High Court pursuant to

A s. 53 of the Child Act. The learned High Court Judge granted the ex-wife's application. The decision of the High Court was affirmed by the Court of Appeal.

[24] Before this court, one of the questions of law posed was:

B > Whether on the interpretation of sections 52 and 53 of the Child Act 2001, a Recovery Order can be made where there exists a custody order given by the Syariah Court which is enforceable at the same time.

[25] This court answered the above question in the negative. The court was of the view that a recovery order can only be issued in circumstances C provided for in s. 52 of the Child Act and can only be obtained if the elements in s. 53 of the same Act are fulfilled. The elements to be fulfilled are:

(a) the court has reason to believe that a child has been taken or sent away; or

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(b) the act is done without the consent of the person who has lawful custody of the child.

[26] It was decided in that case that the phrase "lawful custody of a child" in s. 52(2) of the Child Act includes a person who has been conferred custody E by virtue of any written law or by an order of a court including a Syariah Court. Thus in that case, it was held that since there was a custody order by the Syariah High Court giving custody to the ex-husband, the High Court could not possibly issue a recovery order under s. 52 of the Child Act. The civil High Court could not direct the IGP or his officers to execute the recovery order as both the Syariah High Court order and the civil High Court F order bind the IGP and his officers either way and the execution and performance of one order was impossible without being in contempt of the other.

[27] Similarly, in the present case, there are two conflicting custodial G orders. One was the Syariah High Court order giving custody of the children to Pathmanathan. The other was the civil High Court order which gave custody of the children to the appellant. As such, we are of the view that the recovery order should not have been given by the civil High Court because like the *Viran Nagapan*'s case the pertinent element under s. 52 of the Child Act had not been fulfilled. No order of *mandamus* can be issued when such H right is doubtful and not free from any reasonable controversy. (See *Koon Hoi Chow v. Pretam Singh* [1972] 1 LNS 56; [1972] 1 MLJ 180b).

[28] Based on the above, the IGP can be excused for not taking any action to enforce the recovery order. The IGP's quandary over the matter is well I founded.

[29] The next issue is whether the IGP can refuse to command the execution of the warrant of committal against Pathmanathan. Before deciding on this issue the following facts need to be highlighted:

(a) On 31 March 2009, Pathmanathan forcibly took PD, then 11 months old, away from the appellant without her consent. The appellant lodged two police reports in respect of the said abduction;

(b) On 11 March 2010, the civil High Court granted the appellant custody care and control of the children and ordered Pathmanathan to hand over PD to the appellant immediately;

(c) Pathmanathan appealed against the said decision to the Court of Appeal. However, Pathmanathan's appeal was struck out by the Court of Appeal as he had failed to diligently pursue his appeal;

(d) On 27 November 2012, Pathmanathan's application for leave to appeal to the Federal Court against the decision of the Court of Appeal was dismissed;

(e) On 23 September 2013, the appellant commenced the contempt action against Pathmanathan for wilfully refusing to comply with the civil High Court order, to hand over PD to her. Leave was obtained on 18 October 2013 and the notice of application for an order of committal was filed on the same day;

(f) The committal action was contested by Pathmanathan. His defence was that he had the Syariah High Court order giving custody of the three children to him, and thus, he was duty bound to follow the Syariah High Court custody order;

(g) The learned High Court Judge found that Pathmanathan's act of refusing to hand over PD to the appellant was a clear contempt of court. An order was made that Pathmanathan be committed to prison until the contempt was purged by the delivery of PD to the appellant. Accordingly, a warrant of committal was issued against Pathmanathan;

(h) Pathmanathan, thereafter appealed against the decision of the learned High Court Judge in finding him guilty for contempt and in issuing the warrant of committal against him; and

(i) On 10 September 2014, the appeal was struck out by the Court of Appeal on the preliminary issue raised by learned counsel for the respondent that Pathmanathan needed to purge his contempt before his appeal could be heard. Further Pathmanathan had again failed to diligently file the relevant papers relating to his appeal. He was out of time to file his memorandum of appeal.

[30] On the above facts and circumstances, the issue is, can the IGP be excused for not commanding his officers to execute the warrant of committal against Pathmanathan? The learned Senior Federal Counsel, as stated earlier took the position that the IGP cannot be compelled with the order of *mandamus* to execute the warrant of committal as the subject matter before the court has arisen from a private civil dispute between the appellant and Pathmanathan. She further submitted that public policy militates against the use of public resources by the IGP and the police force to enforce the private rights as opposed to public rights especially when the private rights do not affect the public at large.

[31] With respect we disagree. This case does not relate purely to the private right of the appellant and Pathmanathan over the custody of the three children. The private dispute between the two parties had somewhat developed into a challenge to the administration of justice. Pathmanathan, despite having exhausted all avenues to challenge the custody order granted by the civil High Court, is now wilfully disobeying the court's order. After his application for leave to appeal was rejected by this court, he still refused to hand over PD to the appellant. When the contempt proceeding was instituted against him, he defended his action. When he was found guilty of contempt for disobeying the custody order, he appealed to the Court of Appeal. But when his appeal was struck out, he disappeared together with PD.

[32] The chronology of events in this case showed that Pathmanathan has no respect for the court's order. He had willingly submitted himself to the jurisdiction of the civil court and due process was accorded to him but when the case did not turn out in his favour, he decided to ignore the court's order. We are of the view that this kind of conduct cannot be condoned. The administration of justice will be brought into disrepute if the court's order is wilfully disobeyed by a party against whom a warrant of committal had been issued after he was found guilty of contempt of court.

[33] We are of the view that Pathmanathan must be apprehended to face justice. In order to do so, the warrant of committal needs to be executed and the proper authority to do so has to be the police. The general duties of police officers under the command of the IGP are provided for under s. 20(3) of the Police Act 1967 which provides:

> (3) Without prejudice to the generality of the foregoing provisions or any other law, it shall be the duty of a police officer to carry out the purposes mentioned in subsection 3(3); and he may take such lawful measures and do such lawful acts as may be necessary in connection therewith, including:
>
> (a) **apprehending all persons whom he is by law authorised to apprehend;**

(f) **executing summonses, subpoenas, warrants, commitments and other process lawfully issued by any competent authority;**

(j) giving assistance in the protection of life and property;

(m) escorting and guarding prisoners and other persons in the custody of the police.

(emphasis added)

[34] It can be seen from the above that the duties of a police officer include the execution of warrants. This must include warrants of committal issued resulting from a contempt proceeding. In that light, we are of the view that on the facts and circumstances of this case the IGP cannot refuse to command his officers to execute the warrant of committal issued by the civil High Court. Thus, when the IGP declared his intention not to execute the said warrant of committal, an order of *mandamus* can be issued against him.

[35] Therefore, we would answer the question posed to us in the following manner. An order in the nature of *mandamus*, under para. 1 of the Schedule to the Courts of Judicature Act 1964 can be directed to the IGP to compel him to command the execution of the warrant of committal (Form 108 of the Rules of Court 2012) when the IGP has demonstrated a refusal to execute or command the execution of the said warrant of committal. But, for the reasons given earlier, we cannot answer the same with regard to the recovery order issued by the civil High Court.

[36] In consequence, we allow this appeal. We therefore set aside the decision of the majority in the Court of Appeal. The High Court's decision which was affirmed by the minority in the Court of Appeal in issuing a *mandamus* order against the IGP to execute the warrant of committal is hereby reinstated. In the circumstances, we make no order as to costs.

[37] We remit this case to the High Court at Ipoh, for the High Court Judge there to monitor the progress of the execution of the warrant of committal against Pathmanathan.

[38] This judgment is prepared pursuant to s. 78(1) of the Courts of Judicature Act 1964, as our learned brother, Justice Abdull Hamid Embong FCJ, has since retired.